

Decision 04-08-056

August 19, 2004

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the  
Commission's Own Motion to Establish  
Consumer Rights and Consumer  
Protection Rules Applicable to All  
Telecommunications Utilities.

Rulemaking 00-02-004  
(Filed February 3, 2000)

**ORDER DENYING MOTIONS FOR STAY**  
**OF DECISION 04-05-057**

In D.04-05-057 ("Decision") the Commission adopted General Order ("G.O.") 168, Rules Governing Telecommunications Consumer Protection ("the Rules"), applicable to all Commission-regulated telecommunications utilities. As explained in the Bill of Rights ("BOR"), which precedes the Rules, the purpose of the Rules is to protect telecommunications consumer rights concerning disclosure, choice, privacy, public participation and enforcement, accurate bills and redress, and safety. (G.O. 168, Part 1.) To this end, G.O. 168 imposes a number of requirements on telecommunications carriers in a number of areas such as billing methods, terms of service, marketing, and slamming.

AT&T Wireless, et al. ("Joint Wireless Carriers" or "JWC"), and Nextel California Incorporated ("Nextel") both filed timely applications for rehearing. The Wireline Group ("Wireline") filed two applications for rehearing, one that solely addresses issues concerning the timeline for implementation of the Decision. In addition, these three groups filed separate motions to stay the Decision. The Wireline Group, Consumers Union et al. ("Consumers"), the Attorney General and the Office of Ratepayer Advocates ("AG/ORAs"), California

Small Business Roundtable/California Small Business Association (“CSBRT/CSBA”) filed responses to one or more of the applications for rehearing. AG/ORA, the Latino Issues Forum, CSBRT/CSBA, and Consumers responded to the motions for stay.

In separately filed motions for a stay of D.04-05-057 pending rehearing, Nextel, Joint Wireless Carriers, and the Wireline Group (referred to collectively as “Carriers”) allege: 1) the telecommunications industry will suffer serious and irreparable harm if a stay of implementation is not granted; 2) it is likely that the rehearing applicants will prevail on the merits; 3) the public and other parties will not be harmed if a stay is granted; and 4) the extension process is not sufficient to prevent harm to the telecommunications carriers.

This order addresses the Carriers’ motions for a stay.

Public Utilities Code section 1735 states that an application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision of the Commission, or operate to stay or postpone the enforcement of any order, “except in such cases and upon such terms as the commission by order directs.” Thus, the Commission has the authority to stay a decision in its discretion. (*Compare* Public Utilities Code sections 1761 through 1766, which require the Court of Appeal or Supreme Court to make a specific finding of “great or irreparable damage” in issuing a stay of a Commission decision.)

The Commission has applied a variety of factors in determining whether there is good cause to grant a stay pending rehearing of its own decisions. Two of the primary factors in determining whether to grant a stay are: 1) whether the moving party will suffer serious or irreparable harm if the stay is not granted; and 2) whether the moving party is likely to prevail on the merits. The Commission has applied the irreparable harm/likelihood of success on the merits standard in a number of cases. *See, e.g., Utility Consumers Action Network v. Pacific Bell* (“UCAN”), D.01-11-069, 2001 Cal. PUC LEXIS 1121 (Nov. 21,

2001); *Pacific Gas and Electric Company*, D.99-09-035, 1999 Cal. PUC LEXIS 602 (Sept. 2, 1999). This standard is applied flexibly; a moving party need not demonstrate that both factors have been met. Rather, if there is high degree of irreparable harm, something less than likelihood of success on the merits may justify a stay. Similarly, if there is no harm to the moving party, a stay may not be appropriate even if the party may ultimately prevail.

In considering whether to impose a stay, the Commission also balances harm to the applicant or the public interest if the decision is later reversed, versus harm to other parties or the public interest if the decision is affirmed. *Re Line Extension Rules of Electric and Gas Utilities*, Res. E-3627, 1999 Cal. PUC LEXIS 928 (Nov. 4, 1999). The Commission can also look at the harm to the public if the decision is stayed versus the harm to the public if it is not. In addition, the Commission has considered other factors relevant to a particular case, such as whether an applicant for rehearing will go to court before the Commission has had an opportunity to act on the rehearing application.

In their stay motions, the Carriers assert that they will be irreparably harmed in attempting to meet the unreasonably short deadlines imposed by the Decision. Not surprisingly, the Carriers also maintain they have a strong likelihood of prevailing on the merits of their applications for rehearing, or have raised substantial questions. The Carriers further allege no harm to the public or other parties will result if the Commission orders a stay of the Decision. For these reasons, the Carriers maintain that a stay of the Decision is warranted.

Citing the difficulty of complying with numerous burdensome and vague rules, the Carriers argue that their efforts to implement the Decision pending review of the applications for rehearing will constitute serious and irreparable harm. In the words of the Joint Wireless Carriers, carriers “will be compelled to devote huge resources, including many millions of dollars, in an attempt to implement the new rules – money which will be completely wasted should the rules be overturned or otherwise revised upon further review.” JWC

Motion at 6. Nextel further argues, “even massive carrier efforts to complete the extensive number of tasks required by D.04-05-057 within the limited time allowed will not result in compliance.” Nextel Motion at 10. The Carriers’ arguments concerning irreparable harm are ultimately unconvincing. The Carriers fail to provide any specific information regarding the extent to which they will be harmed, and even if the Carriers’ claims were more specific they would not constitute irreparable harm under the state law standard.

Under the standard applied by the California Court of Appeal, and cited by the Commission, monetary loss alone is not an adequate showing of irreparable harm. *North Shuttle Service, Inc. v. Public Utilities Commission*, 67 Cal. App. 4<sup>th</sup> 386, 395 (1998); *UCAN* at 1121. According to *North Shuttle*, the Court of Appeal will only consider monetary loss to be irreparable harm where the applicant has specifically demonstrated that the loss is severe enough to jeopardize an appellant’s entire enterprise. *North Shuttle* at 395. As AG/ORA notes, in *UCAN*, Pacific Bell’s specific allegation of \$14.5 million loss to comply with the Commission’s order did not demonstrate irreparable harm. *UCAN* at 1121.

In the current motions for stays, the Carriers have provided much less support for their claims of harm than Pacific Bell provided in *UCAN*. Although there are clearly some costs associated with implementation, the Carriers never even specify how much monetary loss will result from their attempts to comply with the Decision pending a decision on their applications for rehearing. Instead, the Carriers rely on generalities and adjectives such as “huge” and “massive.” For instance, the JWC claim that wireless carriers will be forced to devote “many millions of dollars” appears to refer to the Carriers as a group. There is no specific allegation in any of the motions that any enterprise will be severely economically impacted by their attempts to comply. The Carriers also urge that the Commission apply a less strict standard for judging irreparable harm. However, the Carriers’ arguments give the Commission nothing on which to base an assessment of the actual harm to any particular carrier, or even to the industry as a whole, regardless

of the standard applied. The Carriers have failed to demonstrate that they will suffer irreparable harm.

Wireline also contends that the fact that it will be unable to comply with the implementation deadlines will cause it irreparable harm because of the threat of “Commission sanctions and oppression litigation.” Wireline Motion at 13. Aside from the fact that these concerns are speculative, these consequences are also avoidable pursuant to the Decision. According to the Decision, the Carriers may request an extension of time to comply with the Decision, pursuant to Rule 48(b) in the event they can present specifics concerning their inability to comply with particular provisions. The Decision specifically states:

The Commission recognizes that there may be difficulties in implementing certain aspects of these rules. . . . Should it be necessary our Rules of Practice and Procedure provide a procedure in Rule 48(b) for parties to seek an extension of time to comply with a Commission order by sending a letter to the Executive Director . . . .<sup>1</sup>

Decision, at 149. Therefore, although the Decision sets an implementation schedule, it also makes allowances for the fact that it is possible that not all the Carriers will be able to comply with the deadlines. In fact, the Executive Director has now granted eighteen such Rule 48(b) requests concerning tariff filings, the

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<sup>1</sup> The Commission also outlined certain requirements that must be met for an extension request to be granted:

We would expect any such extensions to be granted only where the carrier has demonstrated the delay was unavoidable, has tailored the request as narrowly as possible to encompass only that part of the order and general order for which it is truly needed, has submitted a reasonable plan and timetable for achieving compliance within the requested time extension, has taken all feasible steps to lessen the effects on customers of the requested delay, and is able to demonstrate good faith compliance with all other parts of the order and general order.

Decision at 149. The Decision also provides that if many requests are filed the Commission may convert them into a petition to modify. *Id.*

first step in complying with the Decision. These requests followed the requirements outlined in the Decision.

Wireline contends that the Rule 48(b) procedure is inadequate and does not cure the problems with the implementation deadlines. According to Wireline, converting the requests to petitions to modify would prevent them from being resolved in a timely fashion. Wireline's arguments that resolution of requests could take months, or fail to provide needed relief, are speculative. There is no reason to believe that the Carriers would not be able to obtain relief through this procedure, and, indeed, some have already obtained such relief. If an urgent request were presented, there is no requirement that it must be converted to a petition. However, it bears emphasis that, as required in the Decision, these requests would need to be narrowly tailored, and meet the other outlined requirements. We accordingly reject the Carriers' argument that the extension process is not sufficient to prevent harm to the telecommunications carriers

We also consider the harm that may result if a stay of the Decision is granted. The Carriers allege that there will be no great harm to the parties or the public if a stay is granted because it will simply preserve the status quo, and consumers are already largely protected under other state and federal laws. However, this argument ignores the fact that, although the Carriers' position is that the status quo should be preserved, the Decision finds that consumers are not adequately protected in the absence of the G.O. *See* Decision, F.F. 2. The most compelling reason for not staying the Decision is that inadequate consumer protection will persist until the G.O. is implemented. Moreover, as consumer groups note, it has already been a long wait for consumers to gain these protections, since this proceeding was opened in 2000.

We do not find that the Carriers have demonstrated good cause for a stay. Although there is some amount of cost to the Carriers in complying with the Decision, the Carriers have failed to demonstrate that this cost constitutes irreparable harm. Although the Carriers correctly note that Commission in its

discretion has issued stays where the harm is not severe or irreparable, the fact remains that on the harm prong of the balancing test the Carriers have not shown that great harm will result.

We also reject a stay based on any claim of the likelihood of the Carriers prevailing on the merits of the arguments raised in their applications for rehearing.

Therefore, **IT IS ORDERED** that:

1. The Motions for Stay of D. 04-05-057 filed by Joint Wireless Carriers, Nextel California, Inc., and The Wireline Group are denied.

This Order is effective today.

Dated August 19, 2004, at San Francisco, California.

CARL W. WOOD  
LORETTA M. LYNCH  
GEOFFREY F. BROWN  
Commissioners

I dissent

/s/ MICHAEL R. PEEVEY  
President

I dissent

/s/ SUSAN P. KENNEDY  
Commissioner